Supreme Court, U.S.
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No. __-____

IN THE
Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY
D/B/A AT&T CALIFORNIA, ET AL.,
Petitioners,

v.

LINKLINE COMMUNICATIONS, INC., ET AL.,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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October 17, 2007

QUESTION PRESENTED

Whether a plaintiff states a claim under Section 2 of the Sherman Act by alleging that the defendant – a vertically integrated retail competitor with an alleged monopoly at the wholesale level but no antitrust duty to provide the wholesale input to competitors – engaged in a "price squeeze" by leaving insufficient margin between wholesale and retail prices to allow the plaintiff to compete.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Pacific Bell Telephone Company (which now does business as AT&T California (formerly SBC California)), Pacific Bell Internet Services (now known as SBC Internet Services, Inc. d/b/a AT&T Internet Services and AT&T Entertainment Services), and SBC Advanced Solutions, Inc. (d/b/a AT&T Advanced Solutions) were the defendants in the district court proceedings and the appellants in the court of appeals proceedings.

Respondents linkLine Communications, Inc., InReach Internet LLC (now known as InReach Internet, Inc.), Om Networks d/b/a Omsoft Technologies, and Nitelog, Inc. d/b/a Red Shift Internet Services were the plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Pacific Bell Telephone Company (which now does business as AT&T California (formerly SBC California)), Pacific Bell Internet Services (now known as SBC Internet Services, Inc. d/b/a AT&T Internet Services and AT&T Entertainment Services), and SBC Advanced Solutions, Inc. (d/b/a AT&T Advanced Solutions) state the following:

Pacific Bell Telephone Company is a wholly owned subsidiary of AT&T Teleholdings, Inc., which is a wholly owned subsidiary of AT&T Inc. (formerly SBC Communications Inc.). AT&T Inc. has no corporate parent. No publicly held corporation owns 10% or more of the stock of AT&T Inc. AT&T California (formerly SBC California) is the trade name under which Pacific Bell Telephone Company does business in California.

SBC Internet Services, Inc. (formerly Pacific Bell Internet Services) is wholly owned by AT&T Teleholdings, Inc., which is wholly owned by AT&T Inc. SBC Internet Services, Inc. does business under the trade names AT&T Internet Services and AT&T Entertainment Services.

SBC Advanced Solutions, Inc. is jointly owned by AT&T Inc. and AT&T Teleholdings, Inc. SBC Advanced Solutions, Inc. does business under the trade name AT&T Advanced Solutions.

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Petitioners Pacific Bell Telephone Company d/b/a AT&T California, Pacific Bell Internet Services (now known as SBC Internet Services, Inc. d/b/a AT&T Internet Services and AT&T Entertainment Services), and SBC Advanced Solutions, Inc. d/b/a AT&T Advanced Solutions respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) will be, but has not yet been, reported (it is available at 2007 WL 2597258). The orders of the district court (Pet. App. 25a-57a, 58a-91a) are not reported.

JURISDICTION

The court of appeals entered its judgment on September 11, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

INTRODUCTION

Respondents (plaintiffs below) purchase telecommunications services at wholesale from petitioners (collectively, "AT&T") and use them to provide retail Internet-access service in competition with AT&T. They alleged that AT&T was a monopolist at the wholesale level and had violated Section 2 of the Sherman Act by creating a "price squeeze," that is, by leaving insufficient margin between the wholesale and retail prices that AT&T charged. The Ninth Circuit – stating that "price squeeze theory form[s] part of the fabric of traditional antitrust law," Pet. App. 14a – ruled that respondents had stated a claim, even though, as the Ninth Circuit acknowledged, under this Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), AT&T – which had not engaged in a relevant prior voluntary course of dealing – had no antitrust duty to offer the wholesale input to competitors. And it did so despite its acknowledgement that the D.C. Circuit had recently ruled, in indistinguishable circumstances, that such a claim could *not* proceed. *See Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673-74 (D.C. Cir. 2005).

The Ninth Circuit has thus decided an important and recurring question of antitrust law in a manner that creates a square circuit-court conflict. The decision also contradicts and undermines *Trinko*, by creating a purported exception to *Trinko*'s rule that – in the absence of any antitrust duty to deal – a rival's allegations that a monopolist has provided insufficient assistance fail to state a claim under Section 2. Moreover, the Ninth Circuit's recognition of price-squeeze claims as an independent basis for liability under Section 2 threatens to harm consumers by

deterring conduct that promotes efficiency and reduces retail prices. Partial vertical integration – the situation where a company both sells an upstream wholesale input to rivals and produces the downstream product itself – is ubiquitous. Under the decision below, any vertically integrated producer with market power at the wholesale level is potentially subject to a claim of "price squeeze" if the combination of its wholesale and resale prices makes competitive life difficult for its rivals. Yet this Court has recognized that Section 2 does not prevent a legitimate monopolist from charging high prices. And low prices are not unlawful unless predatory pursuant to the standard established in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), which requires pricing below cost and a likelihood of recoupment of any losses, neither of which plaintiffs alleged below. The Ninth Circuit's erroneous decision deters voluntary dealing, efficient vertical integration, and retail price competition that benefit consumers.

Last Term, the Court reversed the Ninth Circuit's standard governing predatory bidding claims, after the United States had warned that the decision, if left unreviewed, "threaten[ed] to chill procompetitive conduct by firms in a wide variety of markets." Brief for the United States As Amicus Curiae at 19, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, No. 05-381 (U.S. filed May 26, 2006). The same concern is emphatically present in this case. This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

1. The District Court's Rulings

Respondents purchase a high-speed digital subscriber line service (known as "DSL transport") from AT&T, combine it with other facilities and services, and then sell retail Internet-access service in competition with AT&T. They sued, claiming that AT&T had engaged in monopolization and attempted monopolization in violation of Section 2 of the Sherman Act by refusing to deal, by denying access to an "essential facility," and by engaging in a "price squeeze." After this Court decided *Trinko*, AT&T moved to dismiss the claims, noting that AT&T had provided DSL transport to rival providers of retail Internet-access service only under compulsion of Federal Communications Commission ("FCC") regulations;[1] that AT&T had no *antitrust* duty to deal with respondents at all; and that respondents' complaints about the terms of dealing between petitioners and respondents therefore failed to state a claim under Section 2. *Cf.* 540 U.S. at 409-10.

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[1] Under the FCC regulations in place during the relevant period, DSL transport – which provides transmission capacity over local telephone lines – was characterized as a basic service (or, in the parlance of the Telecommunications Act of 1996, a telecommunications service) while DSL-based high-speed Internet-access service was characterized as an enhanced service (or information service). *See generally National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975-77, 992-94 (2005). Under the FCC's "*Computer III*" regime – *see* Report and Order, *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 964, ¶ 4 (1986) – telephone companies were permitted to provide enhanced services on an integrated basis only if they also offered underlying basic services to rival providers of enhanced services on a nondiscriminatory basis. *See Brand X*, 545 U.S. at 995; *see also* Pet. App. 5a n.6.

The district court agreed that the refusal-to-deal and essential-facilities claims could not proceed. *See* Pet. App. 77a-86a. The court refused to dismiss the price-squeeze claim, however, finding that *Trinko* "simply does not involve price-squeeze claims." *Id.* at 86a. The court also rejected the argument that price-squeeze claims are unavailable when "wholesale prices are regulated by a federal regulatory agency," *id.* at 87a-88a, finding the argument inconsistent with the Ninth Circuit's analysis in *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992).

As ordered by the district court, respondents amended their complaint to elaborate on their price-squeeze claim. The amended complaint alleged that "defendants unlawfully manipulated their dual role" as a "wholesale-monopoly supplier and retail competitor" by "intentionally charging independent [Internet service providers ("ISPs")] wholesale prices that were too high in relation to prices at which defendants were providing retail DSL services . . . thereby making it impossible for independent ISP competitors . . . to compete at the low retail prices set by defendants." Am. Compl. ¶ 25(A)(1) (quoted at Pet. App. 5a-6a).[2]

[2] The amended complaint further alleged that "for a period" AT&T had "charg[ed] wholesale DSL [transport] prices . . . that actually exceeded the prices at which [AT&T] . . . was charging retail end-user customers." Am. Compl. ¶ 25(A)(1) (quoted at Pet. App. 6a). Respondents alleged that, if they charged the same price for Internet-access service as AT&T, they "could not cover the cost of providing [retail] service," and that, if AT&T "charged [its] retail affiliates the same wholesale costs for DSL transport that they charged their wholesale . . . customers . . . , defendants could not cover their wholesale costs and make a profit." *Id.* ¶ 25(A)(2)-(3) (quoted at Pet. App. 6a).

AT&T again moved to dismiss, arguing that the claim could proceed only if plaintiffs alleged facts supporting the two prerequisites for a predatory-pricing claim under *Brooke Group* – that is, pricing of the retail Internet-access service below cost and a likelihood of recoupment. Although the district court found that there was "persuasive appeal to [petitioners'] argument that the underlying logic of *Trinko,* which is that no inference of anticompetitive intent can be drawn from a refusal to deal where the parties are compelled by law to deal, applies with equal force to price squeeze claims," Pet. App. 55a, it again denied the motion. In the same order, the court granted petitioners' motion to certify its order for appeal. *See id.* at 56a. The Ninth Circuit granted interlocutory review. *See id.* at 92a.

2. The Ninth Circuit's Opinion

The Ninth Circuit affirmed. The court stated that, "[i]n antitrust terms, a price squeeze occurs 'when a vertically integrated company sets its prices or rates at the first (or "upstream") level so high that its customers cannot compete with it in the second-level (or "downstream") market.'" Pet. App. 8a (citation omitted). The court stated that, "[f]or over six decades, federal courts have recognized price squeeze allegations as stating valid claims under the Sherman Act." *Id.* (citing, *inter alia, United States v. Aluminum Co. of Am.*, 148 F.2d 416, 437-38 (2d Cir. 1945) ("*Alcoa*")). The court also noted its prior holding that "claims of

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The amended complaint charged that "defendants are clearly attempting to compensate for deliberately sacrificing profits on the retail end of their operations (with offsetting margins on the wholesale side) in order to stifle, impede and exclude competition from independent" providers of Internet-access service. *Id.* ¶ 25(A)(3) (quoted at Pet. App. 7a).

price squeezing under § 2 are viable against monopolists in regulated industries." *Id.* at 9a (citing *City of Anaheim*).

The Ninth Circuit acknowledged *Trinko*'s holding that "failure by a monopolist to deal with a competitor on certain service terms when that monopolist was under no duty to deal with the plaintiff . . . did not state a claim under § 2 of the Sherman Act." *Id.* at 9a-10a. It stated that *Trinko* thus "raised the question of whether a price squeeze is merely another term of the deal governed by the Supreme Court's analysis in *Trinko*, or whether it is something else." *Id.* at 10a. Asserting that the circuits were already in conflict over the question, *see id.* (comparing *Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050 (11th Cir. 2004) (allowing a "price squeezing" claim to proceed), *cert. denied*, 544 U.S. 904 (2005), with *Covad v. Bell Atlantic*, 398 F.3d at 673-74 (rejecting price-squeeze claim in the absence of a duty to deal in the upstream input)),[3] the court concluded that the case before it was controlled by the Ninth Circuit's earlier decision in *City of Anaheim*, which recognized potential price-squeeze claims. The court thereby decided the question in

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[3] In fact, the Ninth Circuit's suggestion that there was an existing circuit split was mistaken. As AT&T had explained to the Ninth Circuit, what the Eleventh Circuit referred to as "price squeezing" was in substance a claim for predatory pricing under the Supreme Court's test in *Brooke Group*. *See Covad v. BellSouth*, 374 F.3d at 1049-52; *see also Covad Communications Co. v. Bell Atlantic Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005) (order on denial of rehearing) (noting that, in *Covad v. BellSouth*, "the complaint alleged the 'basic prerequisites for . . . price predation'") (quoting 374 F.3d at 1049) (alteration in original); *see also infra* p. 13.

direct and acknowledged conflict with the prior decision of the D.C. Circuit.

The Ninth Circuit offered two reasons for its decision. *First*, it stated that "*Trinko* did not involve a price squeezing theory" and that, "[b]ecause a price squeeze theory formed part of the fabric of traditional antitrust law prior to *Trinko*, those claims should remain viable notwithstanding either the telecommunications statutes or *Trinko*." Pet. App. 14a. *Second*, the court determined that the standard established in *City of Anaheim* was appropriately circumscribed by the requirement that a plaintiff alleging a price squeeze in a regulated industry show "specific intent on the part of the wholesale monopoly holder to 'serve its monopolistic purposes at [retail competitors'] expense.'" *Id.* (quoting *City of Anaheim*, 955 F.2d at 1378) (alteration in original).

The Ninth Circuit also stated that "the existence of regulation does not always eliminate the danger of anticompetitive harm." *Id.* at 15a. "The key, under *Trinko*, is the nature of the regulatory structure at issue." *Id.* The court found itself "confronted with a partially regulated industry": while, "[a]t the wholesale level, there are a series of regulatory mechanisms and regulatory agencies charged with assuring fair play," *id.* at 16a, there is "no comparable regulatory attention paid to the retail DSL market," *id.* at 18a. "It is unclear at this juncture the extent to which linkLine is basing its § 2 price squeezing theory on wholesale pricing, retail pricing, or both. However, since linkLine could prove facts . . . that involve only unregulated behavior at the retail level,"

its claim could not be dismissed on the pleadings. *Id.*[4]

Judge Gould dissented, stating that *Trinko* "takes the issues of wholesale pricing out of the case," such that plaintiffs would have to allege the elements of a predatory-pricing claim with respect to "retail sales of internet connection[s]" to state a claim under Section 2. *Id.* at 20a-21a. Under this standard, the amended complaint failed to state a claim: "plaintiffs . . . did not allege that the seller had the market power to set prices for internet connection[s] in the retail market, that [petitioners'] retail price, contributing to the squeeze, was set below cost, and that losses could later be recouped." *Id.* at 23a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision stands in acknowledged conflict with the prior decision of the D.C. Circuit, which recognized that it makes no sense to permit a price-squeeze claim when the defendant has no antitrust duty to deal in the upstream input. It conflicts as well with prior decisions of the Fourth, Seventh, and Eleventh Circuits, which dismissed indistinguishable price-squeeze claims. And the decision provides plaintiffs an end-run around this Court's decision in *Trinko*, which established a categorical limitation on a monopolist's obligation to as-

[4] The Ninth Circuit directed the district court to judge the viability of the claim at summary judgment based on "whether the complained of behavior took place at the regulated wholesale level, the unregulated retail level, or some combination of the two, and to what extent, if any, the responsible agencies have devoted attention to or had involvement in the complained of conduct." Pet. App. 18a.

sist rivals by dealing with them on favorable terms. For those reasons, the Court should grant certiorari.

Review also is warranted because the Ninth Circuit's decision breathes new life into a price-squeeze doctrine that conflicts with important Sherman Act principles articulated by this Court. The Ninth Circuit's decision begins with the proposition that a plaintiff states a "valid claim[] under the Sherman Act" by alleging that "a vertically integrated company set[] its prices or rates at the first (or 'upstream' level so high that its customers cannot compete with it in the second-level (or 'downstream') market." Pet. App. 8a (internal quotation marks omitted). But a standard that makes the legality of pricing conduct turn on the impact on *competitors* – whether such an impact is "intended" or not – is inconsistent with the bedrock principle that antitrust law is intended for the protection of *competition*, not competitors. Because the Ninth Circuit's decision creates a threat of liability and litigation whenever a vertically integrated firm with market power prices aggressively at the downstream level, the decision promises to deter price cuts that benefit consumers. And the decision will likewise distort business decisions concerning vertical integration and voluntary dealing with downstream rivals, all to the detriment of competition. The Court should accept this opportunity to eliminate price squeeze as an independent basis for liability under Section 2.

I. THE DECISION BELOW - WHICH ALLOWS A PRICE-SQUEEZE CLAIM TO PROCEED EVEN WHEN THE DEFENDANT HAS NO DUTY TO DEAL - CONFLICTS WITH PRIOR CIRCUIT PRECEDENT AND WITH *TRINKO*

A. The Ninth Circuit's Rule Conflicts with the Prior Decision of the D.C. Circuit and the Law in Other Circuits

The Ninth Circuit's determination that a price-squeeze claim may proceed under Section 2 despite the absence of any duty to deal in the underlying wholesale input creates a square conflict with the D.C. Circuit and contradicts prior decisions of the Fourth, Seventh, and Eleventh Circuits as well. The Court should grant certiorari, first of all, to resolve the conflict. *See* Sup. Ct. R. 10(a).

1. The Ninth Circuit understood that, under *Trinko*, "the failure by a monopolist to deal with a competitor on certain service terms when that monopolist was under no duty to deal with the plaintiff competitor absent statutory compulsion, did not state a claim under § 2 of the Sherman Act." Pet. App. 9a-10a. But it reasoned that this holding did not resolve "the question of whether a price squeeze is merely another term of the deal governed by . . . *Trinko*, or whether it is something else." *Id.* at 10a. The Court ruled that, because "*Trinko* did not involve a price squeezing theory" and "took great care to explain that in this particular regulatory context, 'claims that satisfy established antitrust standards' are preserved," plaintiffs' price-squeeze claim was not barred. *Id.* at 14a (quoting 540 U.S. at 406).

As the Ninth Circuit acknowledged, that holding squarely conflicts with the D.C. Circuit's decision in

Covad v. Bell Atlantic. *See id.* at 10a (acknowledging D.C. Circuit's holding that price-squeeze claims in this context do not "survive *Trinko*"). In *Covad v. Bell Atlantic*, Covad provided DSL service in competition with Bell Atlantic, using wholesale inputs purchased from Bell Atlantic. *See* 398 F.3d at 670.[5] As respondents did in this case, Covad claimed that Bell Atlantic had "engaged in anticompetitive conduct" by "pursu[ing] an unlawful 'price squeeze.'" *Id.*[6] Relying on the Second Circuit's decision in *Alcoa*, Covad argued that this price squeeze violated the Sherman Act.

The D.C. Circuit rejected the claim. The court noted that Bell Atlantic had no *antitrust* duty to deal with Covad at the wholesale level; rather, Bell Atlantic's "duty to make those loops available at all" was purely a product of "statutory compulsion." *Id.* at 673. The court therefore "affirm[ed] the district court's dismissal of Covad's § 2 claim based upon a price squeeze," reasoning that a complaint about price squeeze is no different from any other complaint about terms of dealing, and thus barred by

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[5] Covad provided DSL transmission capacity – analogous to the DSL transport service that petitioners provided to respondents – and purchased telephone lines from Bell Atlantic. *See Covad v. Bell Atlantic*, 398 F.3d at 670. Thus (coincidentally) the service that respondents here alleged was the wholesale input for purposes of respondents' price-squeeze claim was the downstream product for purposes of Covad's price-squeeze claim.

[6] The key allegations were that "Bell Atlantic . . . offered and re-sold its DSL services [at retail] . . . at a monthly price . . . very close to, and in some cases less than, the monthly cost Bell Atlantic charge[d] Covad and other wholesale customers for unbundled loops." 398 F.3d at 673 (first set of brackets and second ellipsis added).

Trinko. Thus, "as observed in a leading treatise, 'it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal.'" *Id.* at 673-74 (quoting 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 767c3, at 129-30 (2d ed. 2002)). From the point of view of antitrust law, the monopolist can avoid the potential for any price-squeeze allegation by not supplying the competitor.

2. The decision below also conflicts with prior decisions of the Fourth, Seventh, and Eleventh Circuits. In *Cavalier Telephone, LLC v. Verizon Virginia Inc.*, 330 F.3d 176 (4th Cir. 2003), *cert. denied,* 540 U.S. 1148 (2004), the Fourth Circuit rejected (in a pre-*Trinko* decision) a price-squeeze claim by a retail competitor that purchased wholesale inputs from the defendant. *See id.* at 181, 190; *see also* Areeda & Hovenkamp ¶ 787c3, at 320 n.1 (Supp. 2007). In *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the Seventh Circuit dismissed on the pleadings a claim that the defendant's "wholesale prices . . . prevent[ed] . . . competitors . . . from offering attractive resale prices to consumers." *Id.* at 395. And, in *Covad v. BellSouth*, although the court allowed a "price squeezing" claim to proceed, the Eleventh Circuit "limited the claim to instances that . . . involved predatory pricing – namely, where prices were below cost but these losses were recouped in a subsequent period of monopoly prices." Areeda & Hovenkamp ¶ 787c3, at 321; *see also Covad v. BellSouth*, 374 F.3d at 1052. As the dissent below noted, respondents made no such allegations. *See* Pet. App. 22a, 23a (stating that "the 'price squeeze' contention boils down to a claim of a predatory pricing on sales

. . . in the retail market" and that "plaintiffs . . . did not allege" the requisite elements).

In sum, the very claim that the Ninth Circuit allowed to proceed would have been dismissed in the Fourth, Seventh, Eleventh, and D.C. Circuits. The split of authority is undeniable. Moreover, further development of the issue is unlikely to resolve the split. Whenever possible, plaintiffs seeking to litigate a price-squeeze claim will take advantage of the rule in the Ninth Circuit rather than litigate in courts where, at a minimum, a plaintiff cannot proceed with any price-squeeze claim without establishing that the defendant has an antitrust duty to deal.

B. The Ninth Circuit's Decision Conflicts with *Trinko*

The decision below merits review for the additional reason that it is inconsistent with and threatens to undermine the result in *Trinko*. Sup. Ct. R. 10(c).[7]

1. Respondents' "price squeeze" claim is logically and legally indistinguishable from the *Trinko* plaintiff's refusal-to-deal and "essential facilities" claims, which were based on the allegation that the defendant refused to provide adequate service. As this Court has noted, "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa." *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998). Allowing plaintiffs' claim to proceed on a price-squeeze theory would thus flout the core holding of *Trinko*. If the Ninth Circuit were

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[7] The Ninth Circuit's holding conflicts so sharply with *Trinko* that this Court may wish to consider summary reversal. *See, e.g*, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (summarily reversing antitrust decision that was in clear tension with prior decisions of this Court); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam) (same).

right, plaintiffs might circumvent *Trinko* simply by recasting a claim of *inadequate* access to network elements as a claim of *too-costly* access to network elements.

Furthermore, recognition of a price-squeeze claim in circumstances where there is no underlying duty to deal would entail the same ills underlying the Court's antitrust analysis in *Trinko.* By threatening antitrust liability based in part on allegedly high wholesale prices, such claims impinge on "an important element of the free-market system," that is, a legitimate monopolist's "opportunity to charge monopoly prices." 540 U.S. at 407. Allowing such claims to proceed would thus undermine incentives for "innovation and economic growth." *Id.* More generally, forcing a firm to protect its downstream rivals from the possibility of a price squeeze is one way of "[c]ompelling such firms to share the source of their advantage," which may "lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities." *Id.* at 407-08. Further, it will always be difficult for an adjudicator to distinguish a price squeeze resulting from the defendant's superior efficiency from a price squeeze that reflects "too high" wholesale prices – thus giving rise to a significant risk of false positives. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 24 (1st Cir. 1990) (Breyer, J.); *see Trinko*, 540 U.S. at 412-14. That possibility will raise the litigation risks associated with vigorous price competition, putting upward pressure on *retail* prices. Thus, "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co.*

v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). *See also infra* pp. 23-27.

As an institutional matter, *Trinko* holds that antitrust laws eschew imposition of duties that would "require antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited" – or that would "require continuing supervision of a highly detailed decree." 540 U.S. at 408, 415. Yet the Ninth Circuit's rule would have courts and juries supervise prices at not one but *two* levels – the prices for both wholesale inputs and downstream retail services – and ensure that their interaction did not unduly restrict competitors' ability to compete in the retail market. *See* 3A Areeda & Hovenkamp ¶ 767d2, at 132 (price-squeeze doctrine, as articulated in *Alcoa*, "burdens courts with the prohibitive administrative task of administering the monopolist's prices"). Because that task is beyond judicial competence, "[t]he problem should be deemed irremedia[ble] by antitrust law." *Trinko*, 540 U.S. at 415 (alteration in original; internal quotation marks omitted).

2. *Trinko* mandated dismissal of the claims below for the additional reason that any conceivable threat to competition posed by the alleged "price squeeze" could be remedied through regulatory oversight. As this Court observed in *Trinko*, "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue," including "the significance of regulation." 540 U.S. at 411. Petitioners' duty to provide DSL transport service to respondents was purely a function of then-binding FCC regulations, as the Ninth Circuit recognized. *See supra* note 1. Moreover, the FCC has jurisdiction

not merely to require dealing, but also to regulate its terms – including, if justified, by regulating the relationship between wholesale and retail prices. *Cf. FPC v. Conway Corp.*, 426 U.S. 271 (1976).

The Ninth Circuit believed that, because retail prices of Internet access are not regulated, the existence of regulation at the wholesale level did not preclude respondents' claims. The Ninth Circuit's analysis is incorrect. That the FCC has, for many years, affirmatively determined that it should *not* regulate retail prices of Internet access (and, more recently, has deregulated broadband services more generally) reflects an affirmative (and sound) regulatory judgment, and not absence of regulatory oversight.[8] Here, as in *Trinko*, "a regulatory *structure*" exists "to deter and remedy anticompetitive harm" and "the additional benefit to competition provided by antitrust enforcement will tend to be small." 540 U.S. at 412 (emphasis added); *see also Town of Concord*, 915 U.S. at 25. For that reason as well, the Ninth Circuit should have ruled that respondents failed to state a claim under Section 2.

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[8] *See Brand X*, 545 U.S. at 976-77, 993-94 (describing FCC decision not to regulate enhanced services); *see also* Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (abandoning *Computer III* requirements).

II. THE COURT SHOULD REJECT THE "PRICE SQUEEZE" DOCTRINE ARTICULATED IN THE DECISION BELOW

The Ninth Circuit's embrace of "price squeeze" as a basis for antitrust liability under Section 2 warrants review as well because it presents an issue of significant practical impact and doctrinal importance. Under the Ninth Circuit's standard, the touchstone for liability is that a vertically integrated company has set its upstream wholesale prices "so high that its customers cannot compete with it" in the downstream retail market. Pet. App. 8a (internal quotation marks omitted). That follows the rule first established by the Second Circuit in the influential but widely criticized *Alcoa* decision, which imposed liability under Section 2 when a wholesale-level monopolist set its wholesale prices above a "fair price" and its retail prices so low that competitors were unable to make "a living profit." *Alcoa*, 148 F.2d at 437. A similar version of price-squeeze doctrine had been recognized – before *Trinko* – by the Third Circuit,[9] the Seventh Circuit,[10] and the Eighth Circuit.[11] *See also Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 179-80 (2d Cir. 1990) (recognizing Section 2 claim where defendant allegedly raised price of access to railroad tracks above reasonable level).

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[9] *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 809-10 (3d Cir. 1984).

[10] *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 985 (7th Cir. 1980).

[11] *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1176 n.4, 1178-79 (8th Cir. 1982).

The Ninth Circuit's decision and the other decisions recognizing price squeeze as an independent antitrust tort stand in tension with the First Circuit's decision in *Town of Concord*, in which the court – while having no occasion to resolve the *Alcoa* rule's viability as a general matter – rejected application of the doctrine in the presence of price regulation at the wholesale and retail levels. *See* 915 F.2d at 25. Moreover, price-squeeze doctrine is contrary to important antitrust principles articulated by this Court. Unless corrected by this Court, the doctrine will continue to deter efficient voluntary dealing and price-cutting, harming consumers.

A. Price-Squeeze Doctrine Protects Competitors, Not Competition

As broadly articulated by the Second Circuit in *Alcoa* and by the Ninth Circuit below, price-squeeze doctrine is inconsistent with Supreme Court precedent. *Alcoa* and its progeny imply that a monopolist has a duty to avoid setting its prices in a manner that injures downstream competitors. But the doctrinal focus on the well-being of rivals is fundamentally inconsistent with the principle that the antitrust laws "were enacted for the protection of *competition* not *competitors*." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation marks omitted); *see also* Brief for the United States As Amicus Curiae at 11, *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, No. 84-1907 (U.S. filed May 30, 1986) (arguing that *Alcoa* is incorrect for this reason). As Judge Posner has explained, this principle means that antitrust law does not seek to preserve "competition as a process of rivalry" for its own sake but "competition as a means of promoting economic efficiency." *Olympia Equip. Leasing Co. v.*

Western Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986).

That a prolonged price squeeze may "drive independent competitors out of business . . . does not mean that a price squeeze is anticompetitive." *Town of Concord*, 915 F.2d at 23. The principal objection to "price squeeze" – that it allows a first-level monopolist to reduce competition at a second level – is of no inherent competitive significance. *See* 3A Areeda & Hovenkamp ¶ 756b, at 11 ("Even when a monopolist at one essential stage 'monopolizes' a second stage, consumer harm cannot be inferred and is difficult to identify."). In most circumstances "there is only one monopoly profit to be gained from the sale of an end-product or service," such that the elimination of a downstream rival would not generally lead to higher prices. *Western Res., Inc. v. Surface Transp. Bd.*, 109 F.3d 782, 787 (D.C. Cir. 1997).

Further, any possible anticompetitive consequences stemming from the elimination of a second-level rival must be balanced against the likelihood that a price squeeze itself reflects desirable efficiencies. As the leading treatise recognizes, the traditional suspicion of "price squeeze" reflects a misplaced concern about vertical integration. *See* 3A Areeda & Hovenkamp ¶ 767c, at 126 ("it is difficult to see any *competitive* significance [of a price squeeze] apart from the consequences of vertical integration itself"). But vertical integration "can produce significant cost reductions" by enabling the integrating firm to achieve both "'[p]roduction' efficiencies" – that is, "savings in the cost of producing or distributing goods" – and "'[t]ransactional' efficiencies" – that is, avoidance of costs associated with dealing with other firms. *Id.* ¶ 757a, at 23. Where this is so, "prices that squeeze

the less efficient second-level competitors, even to the point of forcing them from the business, could (by lowering costs) lower prices, or, in any event, save economic resources." *Town of Concord*, 915 F.2d at 24. Moreover, when second-level rivals "exhibit[] some market power," a price squeeze may reflect elimination of supracompetitive margins at the second level. 3A Areeda & Hovenkamp ¶ 756b3, at 14-15. In this situation as well, "price will ordinarily come down and output will ordinarily increase." *Id.*; *see Town of Concord*, 915 F.2d at 24-25.

Recognizing that "extension" of a monopoly is not *generally* anticompetitive, this Court has held that Section 2 does not condemn "monopoly leveraging" – use of monopoly power to gain an advantage in a second market – in the absence of anticompetitive conduct. *Trinko*, 540 U.S. at 415 n.4. The pricing behavior at issue in an alleged price squeeze is not anticompetitive conduct. *First*, Section 2 does not prohibit the charging of "high" prices for a monopoly product. "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system" because it "attracts 'business acumen'" and "induces risk taking that produces innovation and economic growth." *Id.* at 407.

Second, a defendant cannot be held liable for charging "low" but above-cost prices for a downstream product. "[P]rice competition" – in the absence of predatory pricing – "is not predatory activity." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118 (1986); *see United States v. Microsoft Corp.*, 253 F.3d 34, 68 (D.C. Cir. 2001) (per curiam). An integrated retail provider could "squeeze" rivals by lowering its prices below its costs, but, where that

is an antitrust wrong, the rules of predatory pricing – which require a plaintiff to show both below-cost pricing and a likelihood of recoupment of losses, *see Brooke Group*, 509 U.S. at 222, 224 – fully address that behavior. *See* 3A Areeda & Hovenkamp ¶ 767c, at 127 (only potential competitive harm from "price squeeze" should be "resolved under the law of predatory pricing").

Any suggestion that a vertically integrated producer must treat the price charged to others for a wholesale input as the cost of the input to itself ignores economic reality and would deprive the producer and consumers of the benefits of vertical integration. *See id.* ¶ 757a, at 24 ("It is not antitrust's purpose to condemn cost-reducing innovations or structures, even if one consequence is to injure rivals unable to match the cost reductions."). As a lawful monopolist in the wholesale product, an integrated producer is entitled to charge its customers the monopoly price for the wholesale input, but it is equally entitled to ignore the price charged to others and instead to consider the *cost* of producing that input in setting its own retail price. *Cf.* Brief for the United States As Amicus Curiae at 15, *Consolidated Rail Corp. v. Delaware & Hudson Ry. Co.*, No. 90-380 (U.S. filed Apr. 5, 1991) (noting that "the implication of [the Second Circuit's] holding is that a monopolist must deal on terms that provide its rival with a reasonable profit" and stating that "such a requirement would be both unsound in theory and unworkable in practice").

B. Continued Recognition of Price Squeeze as a Potential Basis for Liability Harms Consumers

1. The foregoing shows why it is "extremely hard to identify" circumstances where an alleged "price squeeze" reflects anything other than a legitimate effort to achieve efficient vertical integration by a lawful monopolist. 3A Areeda & Hovenkamp ¶ 767c5, at 129. The Ninth Circuit's approach – which treats the *existence* of a price squeeze as sufficient to state a claim under Section 2 – is therefore unjustified as a matter of antitrust policy. Worse, the court's decision will tend to deter conduct that enhances efficiency and that antitrust law should be careful to protect.[12]

First, subjecting a wholesale monopolist to potential liability for a price squeeze would deter efficient vertical integration and socially desirable, voluntary dealing. A monopolist might offer an upstream product, used by producers of two downstream products. If the monopolist begins to produce one of those products itself, it might face the prospect of price-squeeze litigation brought by rival downstream producers. Such a possibility might either deter the monopolist from entering the downstream market (even in cases where it would be more efficient than

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[12] Almost by definition, price-squeeze claims are brought by rivals, not by consumers; consumers benefit from the very downstream prices that discomfit rivals. This provides an additional reason to eliminate such claims. *See* William J. Baumol & Alan S. Blinder, *Economics: Principles & Policy* 275 (10th ed. 2006) (noting that "[o]ne problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that *undermine* competition and support monopoly power" and that "effective competition by a firm is always tough on its rivals").

existing rivals) or deter the monopolist from selling to downstream producers in the first place. *Cf. Olympia*, 797 F.2d at 375 (if a firm's voluntary dealing with rivals "lay[s] itself open to an antitrust suit," it will likely refrain from such dealing). In either case, consumers are harmed.

Second, the very incidents of vertical integration that yield the greatest consumer benefit – lower-cost production in downstream markets – are precisely those that will "squeeze" downstream competitors. As the Court has remarked with respect to claims of above-cost predatory pricing claims, in many cases, "the exclusionary effect [here, of price squeeze] . . . reflects the lower cost structure of the alleged predator, and so represents competition on the merits." *Brooke Group*, 509 U.S. at 223. A rule that outlaws price squeezes penalizes those instances of vertical integration – and behavior by vertically integrated monopolists – that promise the greatest benefit.

2. The anticompetitive consequences of the Ninth Circuit's price-squeeze standard are aggravated both because the standard is vague and because it purports to govern prices – "the 'central nervous system of the economy.'" *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)).

a. The *Alcoa* price-squeeze test invoked by the Ninth Circuit – which makes liability turn on a monopolist's "charg[ing] more than a 'fair price' for the primary product while simultaneously charging so little for the secondary product that its second-level competitors cannot make a 'living profit'" – is famously difficult to administer. *Town of Concord*, 915 F.2d at 25.

> [H]ow is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price "gap?" . . . And how should the court respond when costs or demands change over time, as they inevitably will?

Id.

The Ninth Circuit's emphasis on a defendant's "specific intent," Pet. App. 14a (citing *City of Anaheim*, 955 F.2d at 1378), does not help. The intent to gain more business almost always means doing so at the expense of one's rivals. Price cuts thus may bring the greatest benefits when they are intended to exclude downstream competitors. More important, this Court has made clear that, if conduct is not objectively anticompetitive, the fact that it was motivated by hostility to competitors is immaterial. *See Brooke Group*, 509 U.S. at 225.[13]

[13] While it has been argued that a price-squeeze claim should be treated in some circumstances as a "constructive refusal to deal," Einer Elhauge & Damien Geradin, *Global Antitrust Law and Economics* 458 (2007), there is no reason to believe that the law of unlawful refusals to deal is not fully capable of dealing with any such concern. And, in any event, such a rationale has no application in this case, where, as the Ninth Circuit found (and as *Trinko* makes clear), petitioners had no antitrust duty to deal in the underlying wholesale input.

b. The urgency of addressing the Ninth Circuit's error is heightened by the fact that its rule distorts pricing decisions, exerting upward pressure on the prices that consumers pay. As then-Judge Breyer noted in similar circumstances, "we ask ourselves what advice a lawyer, faced with the [Ninth Circuit's] rule, would have to give a [vertically integrated] client firm considering procompetitive [price-cuts] in a concentrated industry." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983). Lawyers will have to warn clients that, if such a price-cut would "squeeze" customers that are also downstream competitors, litigation is a likelihood. That threat alone will be sufficient to deter some price cuts: "[I]t is not always necessary to win cases in order to blunt a rival's competitive weapons. Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors." William J. Baumol & Janusz A. Ordover, *Use of Antitrust To Subvert Competition*, 28 J.L. & Econ. 247, 254 (1985).

For this reason, this Court has adopted for predatory-pricing claims a rule that is clear and administrable. That rule exempts from antitrust challenge a category of conduct – "above-cost predatory pricing schemes" – that might, as a theoretical matter, harm competition. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1074-75 (2007); *Barry Wright*, 724 F.2d at 233-34. The basic characteristic of a price-squeeze claim – pricing pressure on a downstream rival – has a strongly pro-competitive tendency. The concern that the Ninth Circuit's decision "could, perversely, 'chil[l] legitimate price cutting,' which directly benefits consumers," *Weyerhaeuser*, 127 S. Ct. at 1074 (alteration

in original), further counsels in favor of this Court's repudiation of any standard that subjects price squeezes to Section 2 scrutiny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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